No. 83-79

In the Supreme Court of the United States

OCTOBER TERM, 1983

DARYL R. JENSEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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This is a tax protester case. Petitioner seeks review of his conviction for willfully failing to file income tax returns, asserting that the district court improperly limited his argument to the jury.

1. Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted of willfully failing to file income tax returns for 1978 and 1979, in violation of 26 U.S.C. 7203.[1] On Count II (relating to 1978), petitioner was sentenced to one year's imprisonment and ordered to pay the costs of prosecution not to exceed $5,000. On Count III (relating to 1979), petitioner was sentenced to one year's imprisonment, six months of which

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[1] Petitioner was acquitted of a similar violation relating to 1977 (Pet. 4).

were suspended on the conditions that petitioner pay a fine of $2,000 and file all prior and current tax returns due. Petitioner was also placed on probation for three years. The court of appeals affirmed (Pet. App. A1-A9).

2. Evidence introduced by the government at petitioner's trial established the following facts: During the years 1977, 1978, and 1979, petitioner, an electrician, earned gross income in the respective amounts of $31,492, $38,715 and $30,621 (Tr. 15). Petitioner filed Forms 1040 with the Internal Revenue Service ("IRS") purporting to be his federal tax returns for each year, but he failed to include thereon any requested information except his name, address, occupation and marital status (Exhs. 1, 2, 3). On each line requesting tax-related information (such as gross income, deductions, taxable income, and tax due), petitioner inserted the words "object, self-incrimination" or "none." Attached to each Form 1040 was a "memorandum" consisting of quotations from judicial decisions that assertedly justified a taxpayer's refusal, on Fifth Amendment grounds, to provide tax information; the "memorandum" included an argument that a "good faith erroneous claim of privilege cannot lawfully be punished" and that a "good faith erroneous claim of privilege entitles a taxpayer to acquittal under [Section] 7203."[2]

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[2]Petitioner also attached to each Form 1040 other materials said to support his Fifth Amendment claim. These included clippings from various periodicals, bearing titles like "Big Brotherism Grows" and referring to the "growing Tax Revolt"; documents referring to prosecution of other tax protesters; and a copy of a Form 1040 filed by another taxpayer who, like petitioner, had inserted the words "object, self-incrimination" or "none" on every line (Exhs. 1, 2, 3).

The government also introduced evidence that petitioner had filed proper tax returns for 1972-1976, which set forth all requested tax-related information (Exhs. 4, 5, 6); that the IRS had notified petitioner, shortly after receiving his 1977 and 1978 submissions, that they did not constitute acceptable "tax returns" and that he risked criminal prosecution (Exhs. 9, 10); that petitioner had submitted, within a single three-month period in 1977, three different W-4 forms to his various employers, claiming 40, 60, and 100 exemptions for wage withholding purposes (Exhs. 23, 25); and that petitioner had submitted W-4 forms during 1978 and 1979 claiming to be exempt from all withholding tax (Exhs. 32, 40). Finally, the government introduced into evidence two letters from petitioner to the IRS expressing his "good faith belief" in his right to refuse to supply the information requested on the tax forms (Pet. App. A2).

Petitioner's counsel did not offer any evidence at trial, nor did petitioner testify on his own behalf. Rather, petitioner's counsel proceeded immediately to his closing argument, in which he attempted to argue to the jury that petitioner's assertion of the Fifth Amendment on his tax forms was made in good faith and thus negated the "willfulness" requisite to conviction under Section 7203 (Pet. 5-6). Pursuant to a warning issued during a previous conference on jury instructions, the court foreclosed this line of argument, ruling that petitioner's alleged Fifth Amendment reasons for refusing to supply any tax-related information were "not a justification for failure to file a return" (Tr. 82).

3. The court of appeals correctly ruled (Pet. App. A4-A5) that petitioner could not rely on a blanket assertion of his Fifth Amendment privilege to justify a refusal to provide *any* tax-related information whatsoever. *Albertson* v. *SACB*, 382 U.S. 70, 78-79 (1965) ("a self-incrimination claim against every question on the tax return * * * would be virtually frivolous"); *United States* v. *Sullivan*, 274 U.S.

259, 263-264 (1927). See, *e.g.*, *United States* v. *Barney*, 674 F.2d 729, 731 (8th Cir.), cert. denied, 457 U.S. 1139 (1982); *United States* v. *Johnson*, 577 F.2d 1304, 1310-1311 (5th Cir. 1978) (citing cases). This Court's decisions have long made clear that the Fifth Amendment privilege must be invoked selectively, in response to particular questions that might tend to incriminate; it does not license a wholesale refusal to fill out a tax form. *Marchetti* v. *United States*, 390 U.S. 39, 50 (1968); *Albertson*, 382 U.S. at 78-79; *Sullivan*, 274 U.S. at 263-264.

4. Petitioner maintains (Pet. 7-15) that his blanket invocation of his privilege against self-incrimination, while erroneous, was nevertheless made in good faith; that his good faith negated "willfulness"; and that the trial judge accordingly erred in precluding his counsel from raising the Fifth Amendment issue in closing argument. It is of course true that a defendant cannot be convicted under Section 7203 "for an erroneous claim of privilege asserted in good faith." *Garner* v. *United States*, 424 U.S. 648, 663 & n.18 (1976). Yet this principle has little if any application here, for there was simply no credible evidence before the jury that petitioner had invoked the privilege in the sincere belief that he was entitled to do so. Petitioner did not testify in his own defense and presented no other evidence of good faith. Petitioner's letters to the IRS (Pet. App. A2) and the "memoranda" he attached to his purported tax returns (Exhs. 1, 2, 3) did no more than invoke the privilege and assert, self-servingly, that it was claimed in good faith. These materials do not suggest that petitioner consulted counsel about his theory of the Fifth Amendment, nor do they indicate in any way why petitioner thought that responding to the questions on the tax forms might incriminate him. At the time petitioner's counsel began his closing argument, therefore, there was no evidence that would have permitted the jury to evaluate a claim that petitioner had

relied in good faith on the privilege against self-incrimination and, hence, no reason for the trial judge to permit such argument. *Battle* v. *United States*, 209 U.S. 36, 38 (1908); *Bird* v. *United States*, 187 U.S. 118, 132 (1902); *United States* v. *Lavallie*, 666 F.2d 1217, 1219 (8th Cir. 1981).[3]

5. Even assuming that petitioner should have been permitted to make his Fifth Amendment argument to the jury, any error by the trial judge in this regard was clearly harmless beyond a reasonable doubt. Here, the only conclusion the jury could have reached, on the basis of the evidence before it, was that petitioner had acted in bad faith.

The evidence established, for example, that petitioner had filed "normal" returns for 1972-1976, indicating his awareness of the duties imposed by the tax laws (Exhs. 4, 5, 6). The documents petitioner submitted for 1977-1979 were of the standard "tax protester" variety, setting forth no tax-related information whatsoever and asserting the Fifth

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[3]The cases upon which petitioner relies (Pet. 10-11) are of no help to him. In *United States* v. *Murdock*, 290 U.S. 389, 396-397 (1933), this Court upheld a defense of good faith (but erroneous) invocation of the privilege in view of the unsettled state of Fifth Amendment law at the time. In this case, by contrast, the law was absolutely clear, when petitioner filed his purported tax returns, that a blanket invocation of the Fifth Amendment on a tax return was unjustifiable (see p. 3, *supra*), and petitioner offered no objective evidence on which a rational jury could have found that he possessed a good faith belief to the contrary. In *United States* v. *Thiel*, 619 F.2d 778, 781 (8th Cir.), cert. denied, 449 U.S. 856 (1980), *United States* v. *Ware*, 608 F.2d 400, 405 (10th Cir. 1979), and *United States* v. *Hoopes*, 545 F.2d 721, 722-723 (10th Cir. 1976), cert. denied, 431 U.S. 954 (1977), the defendants (unlike petitioner here) took the stand and attempted to explain that their actions were taken in good faith, *e.g.*, by stating that they had consulted an attorney. In *United States* v. *Brown*, 600 F.2d 248, 258-259 (10th Cir. 1979), cert. denied, 444 U.S. 917 (1979), the court refused to require a "good faith" instruction where the defendant "did not present evidence capable of establishing a good faith defense," noting that "it is difficult to establish good faith where the defendant has chosen not to testify."

Amendment even as to his social security number (Exh. 3).[4] The cases quoted in petitioner's "memorandum" explicitly state that a blanket assertion of the privilege on a tax return is unjustifiable.[5] Indeed, petitioner's "memorandum" had the foresight to argue that "a good faith erroneous claim of privilege cannot lawfully be punished" (Exh. 3, at 3), casting considerable doubt on the sincerity of his protestations. At the same time that petitioner was filing his "Fifth Amendment" tax returns, he was filing W-4 forms with his employers (Exhs. 23, 25, 32, 40) claiming exemption from wage withholding or claiming a sufficient number of exemptions to prevent withholding; these actions belie any suggestion that his Fifth Amendment claim was genuine, and make clear that he was merely attempting to avoid paying the taxes he owed.

In addition, petitioner was twice notified by the IRS that his purported returns were unacceptable and that he risked criminal prosecution, yet he persisted in filing substantially identical protest returns, and there is no evidence that he took any steps (*e.g.*, consulting a lawyer) to check the

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[4]Several courts of appeals have ruled that the filing of a "Fifth Amendment return," containing "no information from which the IRS can compute a tax," amounts to *per se* evidence of the unreasonableness of the filer's invocation of the privilege. *E.g.*, *United States* v. *Barney*, 674 F.2d at 731; *United States* v. *Johnson*, 577 F.2d at 1311.

[5]Petitioner's "memorandum," for example, quotes (Exh. 3, at 3) *Heligman* v. *United States*, 407 F.2d 448, 450-451 (8th Cir. 1969), which states that "[t]he privilege must be specifically claimed on a particular question" and that "a blanket privilege against the mere making or filing of the return" is unsupportable. *Garner* v. *United States*, upon which petitioner's "memorandum" principally relies (Exh. 3, at 2-3), states that "the questions in [an] income tax return [are] neutral on their face" and that "requiring certain basic disclosures fundamental to a neutral reporting scheme does not violate the privilege." 424 U.S. at 660-661, 662 n.16.

validity of his alleged views. Finally, the district judge carefully instructed the jury on "willfulness," stating that petitioner could be convicted of failure to file a return only upon proof that his "failure to act was voluntary and purposeful and with the specific intent to fail to do what he knew the law required to be done" (Tr. 115-116).[6] In convicting petitioner, the jury plainly concluded that he was aware of his duty to supply information on his tax return.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[6]It is not clear why the jury convicted petitioner of failing to file returns for 1978 and 1979, yet acquitted him of that charge for 1977. The jurors may have reasoned that petitioner's actions became willful only after he submitted his 1977 documents and was notified by the IRS that they did not constitute "tax returns."

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